

## Shaheem (Migration) [2019] AATA 2550 (12 June 2019)

### DECISION RECORD

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|---------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                                                                                                                                                                                                                                                                                                                   |
| <b>REVIEW APPLICANT:</b>  | Mr Sheikh Abdul Shaheem                                                                                                                                                                                                                                                                                                                                                                        |
| <b>VISA APPLICANT:</b>    | Ms Tazmeen Nisha Khan                                                                                                                                                                                                                                                                                                                                                                          |
| <b>CASE NUMBER:</b>       | 1718145                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>DIBP REFERENCE(S):</b> | BCC2016/1387298                                                                                                                                                                                                                                                                                                                                                                                |
| <b>MEMBER:</b>            | Russell Matheson                                                                                                                                                                                                                                                                                                                                                                               |
| <b>DATE:</b>              | 12 June 2019                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>PLACE OF DECISION:</b> | Sydney                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>DECISION:</b>          | <p>The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:</p> <ul style="list-style-type: none"><li>• cl.309.213 of Schedule 2 to the Regulations; and</li><li>• cl.309.222 of Schedule 2 to the Regulations.</li></ul> |

Statement made on 12 June 2019 at 12:56pm

### CATCHWORDS

*MIGRATION – Partner (Provisional) (Class UF) visa - subclass 309 – whether sponsorship requirements had been met – sponsorship limitations waived – sufficient evidence of genuine and continuing relationship – financial hardship – compelling circumstances – decision under review remitted*

### LEGISLATION

*Migration Act 1958, s 65*

*Migration Regulations 1994, r 1.20, Schedule 2, cls 309.213, 309.222*

### CASES

*Babicci v MIMIA [2004] FCA 1645*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 26 July 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) Subclass 309 visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant (the applicant) is a 38-year-old female national of Fiji. She applied for the visa on 6 April 2016. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.309.213 and cl.309.222 of Schedule 2 to the Migration Regulations 1994 because the delegate was not satisfied that the sponsorship requirements had been met.
3. The review applicant (the sponsor) appeared before the Tribunal on 4 June 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor's father.
4. The sponsor was represented in relation to the review by his registered migration agent.
5. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

### 6. BACKGROUND

7. The applicant lodged an application for a Partner (Provisional) (Class UF) Subclass 309 visa in Suva on 6 April 2016 to migrate to Australia as the spouse of the sponsor who is an Australian citizen.
8. The Department of Immigration records indicate that the sponsor previously sponsored another Fijian national for partner migration to Australia. They were married on 8 October 1997 and divorced on 10 July 2010. The sponsor then entered into a second marriage with another Fijian national on 18 July 2010 who was in Australia at that time on a temporary visa and divorced on 14 July 2013. The sponsor declared that there are no children from his two previous marriages. The sponsor then got married for a third time to another Fijian national (the applicant) on 14 January 2016, and lodged the current partner migration application on 6 April 2016. The Tribunal notes that five years has passed since the date of making the second successful visa application (second sponsorship).

### CONSIDERATION OF CLAIMS AND EVIDENCE

9. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department decision provided by the sponsor to the Tribunal.
10. The evidence the sponsor and witness provided at the Tribunal hearing is recorded throughout this decision record.

### 11. ISSUE

12. The issue in the present case is whether the sponsorship requirements are met; if not whether these requirements can be waived if there are compelling circumstances affecting the sponsor as prescribed in r.1.20J(2).
13. Regulation 1.20J of the Regulations sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship. Under

r.1.20J, a sponsor is limited to a total, in a lifetime, of two approved sponsorships or nominations that lead to a grant of a partner visa (or entry permit) granted on the basis of the domestic violence provisions. If there has been one previous sponsorship or nomination, or if the sponsor was granted a visa or entry permit as a result of being sponsored, a period of five years must have passed since the date of the earlier visa application. These requirements apply unless the Minister, or the Tribunal on review, is satisfied there are compelling circumstances affecting the sponsor r.1.20J(2).

14. Regulation 1.20J applies to visa applications made on or after 1 November 1996 r.1.20J(3). At most, a person may enter into two approved spouse, fiancé, or interdependency sponsorships in their lifetime: r.1.20J(1)(c). The sponsor as indicated above has previously entered into two approved spouse sponsorships, therefore the sponsor limitations apply. These requirements may be waived in compelling circumstance; r.1.20J(2) allows the Tribunal to approve sponsorship that would otherwise fail to meet r.1.20J(1) requirements if there are 'compelling circumstances' affecting the sponsor. As a matter of law, all cases must be assessed against the provisions of r.1.20J(2).

### **Are the sponsorship requirements met?**

15. Clause 309.213 requires that the visa applicant is sponsored by the review applicant, where such a person has turned 18; or where they have not, by the review applicant's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
16. At the time of decision, this sponsorship must have been approved and still be in force. For visa applications made on or after 18 November 2016 the sponsor must also have consented for the Department to disclose to each sponsored applicant any conviction for a relevant offence, unless the conviction has been quashed or otherwise nullified, or where the sponsor has been pardoned with the effect that he or she is taken never to have been convicted of the offence: cl.309.222.
17. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must have lapsed between each sponsorship.
18. Under r.1.20J, a sponsor is limited to a total, in a lifetime, of two approved sponsorships or nominations that lead to a grant of a partner visa (or entry permit) or a visa (or entry permit) granted on the basis of the domestic violence provisions.
19. If there has been one previous sponsorship or nomination, or if the sponsor was granted a visa or entry permit as a result of *being* sponsored, a period of five years must have passed since the date of the earlier visa application. These requirements apply unless the Minister, or the Tribunal on review, is satisfied there are compelling circumstances affecting the sponsor: r.1.20J(2).
20. Evidence before the Tribunal and as provided at the Tribunal hearing is that the sponsor previously sponsored two other persons for partner visas and the visas were granted.
21. The Tribunal finds that the limitation in r.1.20J applies because two other persons were granted relevant permissions as the partner of the sponsor on the basis of a sponsorship or nomination by the sponsor. The Tribunal, on the evidence, finds that the sponsorship limitation applies in the present case to preclude approval of the sponsorship unless the Tribunal is satisfied that there are compelling circumstances affecting the sponsor.

22. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor applicant who is an Australian citizen.

**23. Are there compelling circumstances affecting the sponsor?**

24. The expression 'compelling circumstances' is not defined in the legislation. Whether there are compelling circumstances affecting the sponsor is a matter of fact and degree for the Tribunal to determine. The Tribunal must consider whether the circumstances are such that they evoke interest or attention in a powerfully irresistible way: *Babicci v MIMIA* [2004] FCA 1645 or are 'so powerful that they lead the [Tribunal] to make a positive finding that the [provision] should be waived': *Babicci v MIMIA* [2005] FCAFC 77.

25. Prior to the review hearing the Tribunal was provided with but not limited to the following documents:

- Documentary evidence of the sponsors travel to Fiji on 12 occasions to visit the applicant between 2015 and 2019;
- MoneyGram receipts from 2015 to 2019 confirming ongoing financial support to the applicant from the sponsor;
- Bank statements from ANZ and Westpac confirming the sponsor contributes to the applicants household bills and day-to-day living expenses;
- Photographic evidence and accommodation receipts indicating time spent together by the parties in Fiji;
- Vodafone and Telstra telephone usage statements from 2014 to 2019 indicating communication between the parties during separation;
- A statutory declaration made by the sponsor dated 28 February 2018;
- A letter from the sponsor's general practitioner dated 31 May 2019; and
- A letter from the applicant's general practitioner dated 21 May 2019.

**26. HEARING**

27. At the beginning of the hearing when queried the sponsor declared that there are no children from his previous marriages requiring care and support and his former wives are not deceased. There is no evidence before the Tribunal that the sponsor's former spouse(s) abandoned him.

28. When the Tribunal queried the sponsor if compelling circumstances existed that affected him to allow for the sponsorship limitations to be waived. The sponsor provided oral evidence and a written submission to the Tribunal providing compelling circumstances affecting him in seeking to have the sponsorship limitations waived. He claimed that he was in a genuine and continuing relationship with the applicant and this was also supported by his father at the hearing. The sponsor submitted he was anxious to find a suitable partner who was of the same religion and culture and who would be able to live with him and his parents and have children of their own after two unsuccessful marriages. The applicant stated that at the time of the lodgement of the visa application, neither he nor the applicant was aware of the

sponsorship limitations and it was an honest mistake. He believed that he had only sponsored one of his wives after withdrawing his sponsorship of his second wife. He further stated that this has caused extreme hardship and embarrassment for himself and the applicant causing her to be treated for depression as a result of being ridiculed by her family and neighbours. The applicant provided a medical report from her doctor.

29. The Tribunal does not accept the sponsor's evidence that he believed he had only sponsored one wife after withdrawing his sponsorship of his second wife as the second wife had already obtained her visa before the relationship broke down. Further the Tribunal is of the view it is the responsibility of the sponsor to be aware of the sponsorship requirements and limitations that apply when making an application for partner visa. The Tribunal accepts based on the evidence provided the applicant is being treated for depression.
30. The sponsor stated that he is responsible for the long-term care and support of parents because none of his siblings in Australia are able to help due to their own family commitments. The sponsor and his father provided evidence that his parents' health is failing and they suffer from major health issues that require continuous medical attention and he also takes them to hospital and doctors' appointments for treatment. He submits that, combined with his parents failing health it would be impossible for him to relocate to Fiji because he would suffer financial hardship. He would lose his driving instructor business and would not be able to service his \$260,000 mortgage, look after his parents and support his wife financially. He further submits this would cause extreme hardship to himself, the applicant and his parents.
31. The sponsor submitted that his new relationship is a long-term relationship and he has been in a genuine and continuing relationship. He further stated that he has travelled to Fiji to visit and live with the applicant and her family on 12 occasions and has already booked his next flight in June 2019. The sponsor provided extensive documentation of his travel to and accommodation in Fiji with the applicant from 2014 to 2019. The sponsor also provided extensive evidence of financial support and communication records between the applicant and sponsor while living in separate countries from 2014 to 2019. Based on the evidence provided, the applicant and sponsor although not physically present in each other's company due to geographical reasons, are in and continue to be in a longstanding relationship.

## 32. FINDINGS

33. When making the application, the applicant was sponsored by the sponsor, who completed the relevant sponsorship form. The sponsor was born in 1974 and was over the age of 18 at the time when the application was made. The Tribunal finds that the applicant was sponsored by the sponsor who is an Australian citizen, who claimed to be the spouse of the applicant and who had turned 18.
34. Regulation 1.20J(2) provides that the Tribunal may approve the sponsorship, despite the limitation, if satisfied that there are 'compelling circumstances affecting the sponsor'. Having regard to the parties circumstances individually and as a whole and to the sponsor's credible oral and extensive documentary evidence provided at the Tribunal hearing; the Tribunal is satisfied that the parties' relationship taken on face value, the support the sponsor provides to the applicant emotionally, physically and financially, including the continued hardship of separation, the extensive evidence of being in a long-term partner relationship that has continued since 2014 (for not less than three years: r.1.03(b)), and the care and support the sponsor provides to his parents due to their failing health and the hardship they would incur if the sponsor was not physically present to assist them would be detrimental to and have a significant psychological and emotional impact upon the sponsor if he was not able to care for his aged parents are compelling circumstances affecting the sponsor. Along with combined financial hardship the sponsor would incur due to the forced sale of his business

resulting in him not being able to meet his mortgage repayments and loss of his property if the sponsor were compelled to leave Australia to maintain the parties' relationship are compelling circumstances affecting the sponsor and the sponsorship can be approved despite the operation of r.1.20J(1).

35. There is no evidence before the Tribunal that r.1.20J, r.1.20KA, r.1.20KB or r.1.20KC prevents approval of the sponsorship.
36. On the evidence before the Tribunal the requirements of cl.309.213 and cl.309.222 are met.
37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

## **DECISION**

38. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
  - cl.309.213 of Schedule 2 to the Regulations; and
  - cl.309.222 of Schedule 2 to the Regulations.

Russell Matheson  
Member